and 24 of the petitioner's brief, culminated in a voluntary dismissal of the federal case on August 6, 1935 (R. 47, 48) and a motion to reinstate was denied on October 18, 1937 (R. 48).

On January 26, 1938, at a time when admittedly no federal case was pending, the Common Pleas Court of Mercer County, Ohio, rendered a judgment and decree of foreclosure to Federal Land Bank of Louisville, Kentucky, pursuant to its answer and cross petition in the suit instituted by respondent Peoples Bank, and ordered sale and appraisement (R. 101-103). Two days later, on January 28, 1938, petitioner filed in the above mentioned federal court a second petition under Section 75 of the Bankruptcy Act (R. 49). Such petition in the federal court was pending from January 28, 1938, until October 10, 1938, during which time the sheriff appraised, advertised and sold the farm (R. 69, 70A), which were ministerial acts (R. 111, 128), but the Common Pleas Court of Mercer County, Ohio, made no order or decree with reference thereto nor did it approve or confirm the sale (R. 3, 110-113, 127).

October 10, 1938, the petitioner's second federal court case was dismissed (R. 104-105), the order providing that all stay orders theretofore entered thereunder be set aside and held for naught. The court recited in its order that the possibilities of rehabilitation by the bankrupt were very remote.

December 17, 1938, the Court of Common Pleas, Mercer County, Ohio, confirmed (R. 82-83) the sale which was had on March 14, 1938 to Peoples Bank (John C. Weigel, cashier) and ordered satisfaction of mortgages and lease, with exception of balance due on second mortgage. The sheriff's deed was thereupon delivered (R. 84-86). Writ of possession dated December 29, 1938, was issued by order of the state court to the sheriff and returned executed February 28, 1939 (R. 3, 26). It appears Wenning was dispossessed on February 25, 1939 (R. 34A, 36), at which time no federal case was pending.

November 16, 1938, some 36 days after the second federal court case was dismissed on October 10th, petitioner filed therein a petition for rehearing (R. 51), which was dismissed on January 11, 1939 (R. 51). January 2, 1942, petitioner filed application for order to reinstate second federal court petition (R. 51, 105C), which was dismissed June 5, 1943 (R. 105D).

January 20, 1939, petitioner, Wenning, moved in the Common Pleas Court of Mercer County, Ohio, to recall the writ of possession (R. 3). February 7, 1939, that motion was heard and entry denying the same filed on February 24, 1939 (R. 103A). February 20, 1939, petitioner filed in the Common Pleas Court, Mercer County, Ohio, motion for a new trial and rehearing (R. 3) and on February 25, 1939, filed another motion for new trial and rehearing (R. 3) both of which were denied March 7, 1939 (R. 3, 112).

No appeal was ever taken by petitioner from the decisions or orders of the Common Pleas Court of Mercer County, Ohio, or from the order dismissing the petition in the second federal case. The first federal case had been voluntarily dismissed (R. 47, 48).

By his second amended petition, filed February 28, 1948 (R. 7-13A) in a new suit in the Common Pleas Court of Mercer County, Ohio, petitioner sought, among other things, collaterally to impeach the orders and judgments with reference to the foreclosure on the petitioner's farm and to hold such orders and judgments to be void. The court dismissed the petition (R. 114-115); the Court of Appeals, Third Appellate Judicial District of Ohio, affirmed (R. 130); and the Supreme Court of the State of Ohio dismissed appeal as of right and overruled motion to certify (R. 141).

ARGUMENT.

1. (a) The foreclosure suit of respondent Peoples Bank in the state court was validly instituted on September 26, 1934, when no federal case was pending. The proceedings in the state court prior to January 26, 1938, do not affect

the matters involved here because the foreclosure against petitioner's farm was on the judgment and decree of Federal Land Bank of Louisville, the first mortgage holder, pursuant to its answer and cross-petition. The first federal suit instituted October 2, 1934, had been voluntarily dismissed August 28, 1935.

(b) The judgment and decree of foreclosure on January 26 1938, at the instance and in favor of Federal Land Bank of Louisville were valid. There was no federal case pending at that time. The subsequent ministerial acts in the state court case, such as the order of sale of January 31, 1938, and the sheriff's sale and report of sale did not affect the possession of petitioner, Wenning, nor his right to redeem. He remained in possession until February 25, 1939, or about four and one-half years after Peoples Bank brought the foreclosure suit. Under the law of Ohio (GC 11690, 4 Throckmorton's Ohio Code Annotated, page 499), Wenning could have redeemed up to the time of the order of confirmation of the sale, which was on December 17, 1938. See *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, 7; memorandum of Common Pleas Judge (R. 110-113); opinion of Court of Appeals, Third Appellate Judicial District of Ohio (R. 125-129).

The second federal suit, at the time of the confirmation of the sale December 17, 1938, had been previously dismissed on October 10th and all stay orders theretofore entered therein set aside and held for naught. As this Court said in *Bernards* v. *Johnson,* 314 U. S. 19, 32:

> "* * * Orders and decrees entered by the bankruptcy court, if valid, relieve the respondents, as mortgagees, of any disability to pursue their foreclosure suits arising out of the pendency of the bankruptcy proceeding and left them free to prosecute the foreclosures in the state courts."

Kalb v. *Feuerstein,* 308 U. S. 433, strenuously relied upon by petitioner here, is distinguishable from the foreclosure

proceedings in the Wenning case because Kalb had duly pending in the bankruptcy court a petition for composition and extension of time to pay his debts under Section 75 of the Bankruptcy Act at the time the state court granted the mortgagees' motion for confirmation of the sheriff's sale; at the time the writ of assistance from the state court was obtained, and at the time the sheriff ejected appellant from his farm.

(c) Petitioner's motion for rehearing filed in the second federal case November 16, 1938, 36 days after that case was dismissed on October 10th would not, *ipso facto,* reinstate that federal case or supersede that court's own order dismissing the case and setting aside all previous stay orders. Cf. Rule 59 of the then Federal Rules of Civil Procedure; *Lieshman* v. *Associated Wholesale Electric Company,* 318 U. S. 203, 206. *A fortiori,* the state court would not thereby be ousted of jurdisdiction as otherwise, the case in the federal court could be, merely at the instance of petitioner, revived, reinstated, and prolonged indefinitely by ungranted motion, or successive motions, for rehearing, and all the time it would be contended the state court would be deprived of jurisdiction to act. This Court said in *Union Joint Stock Land Bank* v. *Byerly,* 310 U. S. 1, 8:

> "The termination of the bankruptcy proceeding restored the jurisdiction and power of the State court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court.
>
> "Although the State court's jurisdiction was superseded by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the State court's procedure, it was as if no bankruptcy case had ever existed."

2. Petitioner, Wenning, by his second amended petition filed February 28, 1948 (R. 7-13A) in the Common Pleas of Mercer County, Ohio, in a new suit instituted by him in

which respondents were made parties defendant, sought, among other things, collaterally to attack the foreclosure proceedinges under which petitioner's farm was disposed of to People's Bank, the second mortgage holder, on the order of court procured at the instance of the Federal Land Bank of Louisville, the first mortgage holder.[1]

January 20, 1939, petitioner filed, through counsel, motion in the state court foreclosure proceedings to recall the writ of possession (R. 3). February 7, 1939, the motion to recall the writ of possession was denied, entry denying the same being filed on February 24, 1939 (R. 103A). Moreover, in February, 1939, petitioner filed two different motions for a new trial and a rehearing in the state court foreclosure case (R. 3), both of which were denied, entry being filed on March 7, 1939 (R. 3, 112). Thus, a direct attack had been made by the petitioner on the validity of the orders made in the foreclosure proceedings. Petitioner, having failed to prosecute a timely appeal from the contested orders in the state court foreclosure proceedings, which he could have done (R. 112-113, 128-129), is bound thereby and is now estopped under the principles of *res judicata* collaterally to attack the validity of those proceedings or to relitigate the matters determined therein. This is especially so, since no appeal was taken from the dismissal of the second federal court petition. *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381; *Treinies* v. *Sunshine Mining Company*, 308 U. S. 66, rehearing denied, 309 U. S. 693; *Bernards* v. *Johnson*, 314 U. S. 19; *Robertson* v. *Howard*, 229 U. S. 254; *Wheat* v. *Texas Land & Mortgage Company*, 153 F. 2d 926.

3. From the record before the Court, it is plain that petitioner was given ample opportunity both under state and

[1] Petitioner seeks to have declared void order of sale and confirmation of sale obtained by Federal Land Bank of Louisville, which is not a party to the collateral proceeding now involved in the petition for a writ of certiorari.

federal legislation to rehabilitate himself financially but he was unable or failed to do so. More than four years passed after the institution of the original foreclosure suit before the confirmation of sale took place. In the meantime, petitioner was unable to meet the provisions of Section 75 of the Bankruptcy Act, as amended, and his petition was dismissed. Section 75 was intended to enable farm debtors to retain control of their property by turning over to their creditors the fair and reasonable value of their property but Wenning was evidently unable even to do this; hence his federal court second petition was dismissed. His farm was not taken away from him until February 25, 1939, almost four and one-half years after foreclosure was originally instituted. No appeal was taken by him from any orders of the state or federal court except, of course, the orders in the collateral suit which he much later prosecuted. His collateral attack upon the foreclosure proceedings was instituted December 31, 1941 (R. 114-115) but drifted along for over six years until a second amended petition was filed February 28, 1948 (R. 7-13A) and the suit belatedly prosecuted.

CONCLUSION.

It is respectfully submitted that the writ should be denied because there is not involved any state court judgment or action which was in conflict with the Constitution of the United States; with any federal statute, or with a decision of this Court.

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October, 1950.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 293

JOSEPH G. WENNING, *Petitioner,*

v.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL; JOSEPH PLEIMAN; GEORGE FRONING; EMMA FRONING; LAWRENCE M. DAVIS; RALPH J. AHLERS; THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY, OF HARTFORD, CONNECTICUT, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

BRIEF FOR RESPONDENTS THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL AND JOSEPH PLEIMAN IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Ohio (R. 137, 138), has not been published but may be found in Vol. XXIII, No. 11, of the "Ohio Bar" as 153 OS 583. The opinion of the Court of Appeals, Third Appellant Judicial District of Ohio (R. 125-129) has not been published. The

opinion of the Judge of the Common Pleas Court of Mercer County, Ohio (R. 110-113) has not been published.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C., 1257 (3).

QUESTIONS PRESENTED.

1. Whether in a suit validly instituted, a state court judgment of foreclosure (January 26, 1938) and an order of confirmation of sale December 17, 1938) at a time when no federal case was pending by farmer-debtor under Section 75 of the Bankruptcy Act (11 U.S.C. 203), are void.

2. As a corollary thereof, whether after a federal court dismisses petition of a farmer-debtor under Section 75 of the Bankruptcy Act, setting aside and holding for naught all stay orders theretofore entered therein, a motion for rehearing filed 36 days later (November 16, 1938) and summarily denied on January 11, 1939, could, *ipso facto,* revive the dismissed federal case; supersede that court's order of dismissal, and operate to oust the state court of authority to confirm on December 17, 1939 sale under foreclosure and to order dispossession of farmer on February 24, 1939.

3. Whether petitioner, who appeared, through counsel, in foreclosure proceedings and contested state court's jurisdiction; moved in state court for recall of writ of possession; moved for a new trial and rehearing in the state court; failed to appeal from any state court order in the foreclosure proceedings; failed to appeal from order dismissing federal court petition brought by him under Section 75 of the Bankruptcy Act and involving indebtedness which was the subject of the state foreclosure proceedings, is bound under the principles of *res judicata* and is estopped collaterally from attacking at a late date, judgment of foreclosure; the confirmation of sale; deed to purchaser, and dispossession under authority of state court proceedings.

STATUTES INVOLVED.

The petitioner has claimed that the proceedings below were in contravention of the provisions of 11 U.S.C. 203, as enacted in 1933[1] and as amended in 1934[2] and in 1935.[3] There are also involved, as will be hereinafter shown, sections 11588, 11688 and 11690 of the General Code of Ohio, which may be found in Volume 4 Throckmorton's Ohio Code Annotated (1948 Revision) at pages 460, 488 and 499, respectively.

STATEMENT.

September 7, 1934, respondent The Peoples Bank Company of Coldwater, Ohio, as the holder of note secured by second mortgage on the property involved here, instituted suit in foreclosure against petitioner and others in the Common Pleas Court of Mercer County, Ohio. Federal Land Bank of Louisville, Kentucky, holder of the first mortgage on the property, was one of the parties defendant (R. 1).

October 16, 1934, the Common Pleas Court of Mercer County, Ohio, issued judgment and decree of foreclosure to respondent Peoples Bank (R. 58-60).

January 24, 1935, execution was issued on that judgment (R. 61). Execution was returned March 28, 1935, on such judgment, without action (R. 2); April 25, 1936, order of sale issued (R. 2) and on June 5, 1936, appraisement filed and the order of sale returned unexecuted by order of court (R. 2).

October 2, 1934, petition under section 75 of the Bankruptcy Act (11 U. S. C. 203) was filed by petitioner in the then District Court of the United States for the Northern District of Ohio. Those proceedings, outlined on pages 23

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[1] Act of March 3, 1933, chap. 204, 47 Stat. at L. 1467, 1470, 11 USCA § 203.

[2] Subsection (s) was added to § 75 by the Act of June 28, 1934, chap. 869, 48 Stat. at L. 1289.

[3] Act of August 28, 1935, chap. 792, 49 Stat. at L. 942.